Supreme Court, U. S.
FILED
MAR 29 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1312

CLAUDE C. WILD, JR., *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner Claude C. Wild, Jr. respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review the opinion and judgment of that court rendered in these proceedings on January 21, 1977.

OPINION BELOW

The opinion of the three-member panel of the District of Columbia Circuit, dated January 21, 1977, has not yet been officially reported. The opinion is attached in the appendix hereto, p. 2a.

JURISDICTION

The judgment and opinion below were entered on January 21, 1977. The judgment is attached in the appendix hereto, p. 1a. On timely application, the Chief Justice on February 17, 1977, signed an Order extending the time for filing this petition for certiorari to and including March 22, 1977.

The jurisdiction of this Court is invoked under 28 United States Code § 1254(1).

QUESTIONS PRESENTED

1. Whether a statute of limitations in a Federal criminal case is a jurisdictional limitation upon the power of the District Court to act.

2. Whether a Congressionally enacted criminal statute of limitations can be abrogated by a private agreement between the government and the defendant.

STATUTORY PROVISIONS INVOLVED

2 U.S.C. § 455(a):

> No person shall be prosecuted, tried, or punished for any violation of . . . section . . . 610, . . . of Title 18, United States Code, unless the indictment is found or the information is instituted within 3 years after the date of the violation

18 U.S.C. § 3282:

> Except as otherwise provided by law, no person shall be prosecuted, tried or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

STATEMENT OF THE CASE

The petitioner's relationship with the Watergate Special Prosecution Force (hereinafter WSPF) dates back to a 1973 investigation into illegal corporate campaign contributions by Gulf Oil Corporation (hereinafter Gulf). The investigation apparently culminated on November 13, 1973, when, following negotiation between counsel for Gulf and the WSPF, Gulf and petitioner, who was then a vice-president of the Corporation, each pled guilty to a misdemeanor violation of 18 U.S.C. § 610.[1] However, the WSPF reopened its investigation of petitioner in the Spring of 1975. Petitioner and his attorney were informed of this turn of events in early September of 1975. On September 22, 1975, petitioner's attorney was told by WSPF attorneys that they were prepared to seek an indictment which would be returned on September 26, 1975, charging petitioner with three violations of 18 U.S.C. § 610. Pursuant to the statute of limitations relevant to § 610 prosecutions, 2 U.S.C. § 455(a), September 27, 1975 was the last day on which a prosecution could be initiated for the offense eventually charged in Count II of the pending indictment against petitioner. That violation, involving an allegedly illegal corporate campaign contribution to Senator Sam Nunn, was alleged to have occurred on September 27, 1972. The WSPF attorneys also told petitioner's attorney that they were willing to listen to anything that petitioner had to offer that might cause them not to proceed with the indictment.

At this point, petitioner's attorney, essentially a civil practitioner, did not consider himself sufficiently ex-

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[1] 18 U.S.C. § 610 has since been repealed and recodified in amended form at 2 U.S.C. § 441b.

perienced in criminal matters to proceed further with the representation. Petitioner and his attorney therefore contacted Edward Bennett Williams who agreed to undertake the representation of petitioner in connection with the WSPF investigation.

Williams contacted WSPF attorneys on September 25, 1975. At that time, a number of considerations was apparent: The WSPF was prepared to indict petitioner and only two days remained in which to do that because of the statute of limitations. Williams indicated that he needed more than two days to familiarize himself with the case, to prepare it, and to be in a position to properly represent his client. Finally, a disposition appeared likely in view of the WSPF's stated interest in obtaining further information regarding illegal corporate contributions in return for prosecutorial concessions. Accordingly, to accommodate the interests of both parties, an agreement was reached and implemented. Pursuant to a suggestion by Williams, it was agreed that petitioner would execute a written waiver [2] of the statute of limitations, and deliver it to the WSPF. In turn, the WSPF did not proceed with the indictment.

Following some preliminary discussion, a proffer of information possessed by petitioner was made to WSPF attorneys in November of 1975. But soon thereafter Williams' partner informed the WSPF that his firm would have to withdraw as counsel for petitioner due to a potential conflict of interest. Petitioner then retained present counsel, William G. Hundley, who was informed of what had transpired. Hundley did not

[2] The text of the waiver is reproduced in the opinion of the Court of Appeals. Slip Opinion, p. 4, n.3.

revalidate the waiver; nor was he asked to do so by the WSPF. Following further discussions between Hundley and the WSPF, petitioner submitted to five separate interview sessions with WSPF attorneys in December of 1975 and January of 1976. These interviews directly led to petitioner's appearance before the grand jury on January 27, 1976. Petitioner testified under a limited grant of use immunity which excluded from the area of inquiry the contributions which became the basis of the indictment against him that was subsequently obtained by the WSPF.

On March 12, 1976, the grand jury, upon request of the WSPF, returned a two-count indictment charging petitioner with two violations of 18 U.S.C. § 610.[3] In the District Court, petitioner moved to dismiss Count II of the indictment on the ground that it was barred by the statute of limitations.

In granting the motion, the District Court expressly relied on the doctrine of *Benes* v. *United States*, 276 F. 2d 99 (6th Cir. 1960), approved in *Chaifetz* v. *United States*, 109 U.S. App. D.C. 349, 288 F.2d 133 (1960), *cert. denied*, 366 U.S. 209 (1961), in effectively holding that the defendant's waiver of the statute of limitations was of no legal effect.[4] On appeal taken by the WSPF, the Court of Appeals reversed the District Court's ruling, holding that a criminal statute of limitations is not

[3] The indictment is attached in the appendix hereto, pp. 16a-17a. The District Court found petitioner not guilty of Count I of the indictment following a trial on July 27, 1976. Count II of the indictment, which charges petitioner with willfully consenting to an illegal corporate contribution to Senator Sam Nunn, is the matter before this Court.

[4] The District Court's ruling took the form of an oral opinion rendered from the bench.

jurisdictional and that a defendant's written waiver of a statute of limitations prior to its expiration, with advice of counsel, validly tolls the statute.

REASONS FOR GRANTING THE WRIT

1. The Conclusion of the Court of Appeals that the Statute of Limitations in a Criminal Case Does Not Constitute a Jurisdictional Limitation Upon the Power of the Court to Act Conflicts with the Decisions of Other Circuit and District Courts.

This case presents to this Court for review the disputed character of a Federal criminal statute of limitations. The Court of Appeals concluded that the statute of limitations is not a jurisdictional limitation [5] upon the power of the Court to act, but is rather in the nature of a defense which can be waived. That conclusion is in direct conflict with the decisions of other Federal courts holding to the jurisdictional non-waivable character of a criminal statute of limitations. *Waters* v. *United States*, 328 F.2d 739 (10th Cir. 1964); *Benes* v. *United States*, 276 F.2d 99 (6th Cir. 1960); *United States* v. *Harris*, 133 F. Supp. 796 (W.D. Mo. 1955) (per Judge, later Justice Whittaker).

The decision of the Court of Appeals also places too great a strain upon the very strong prohibitory lan-

[5] A defendant in a criminal case is without power to waive lack of subject matter jurisdiction. *Pon* v. *United States*, 168 F.2d 373, 374 (1st Cir. 1948); *United States* v. *Isaacs*, 493 F.2d 1124, 1140 (7th Cir.), *cert. denied sub nom., Kerner* v. *United States*, 417 U.S. 976 (1974); Rule 12(b), Federal Rules of Criminal Procedure. Nor can subject matter jurisdiction be conferred upon the Court by agreement between the defendant and the government where it does not otherwise exist. *Evans* v. *United States*, 325 F.2d 596, 603 (8th Cir. 1963), *cert. denied*, 382 U.S. 881 (1965). *See also McCusker* v. *Cupp*, 506 F.2d 549 (9th Cir. 1974) and *Colson* v. *Smith*, 315 F. Supp. 179, 182 (N.D. Ga. 1970).

guage which Congress has chosen to express the prohibition contained in 2 U.S.C. § 455(a) and other Federal criminal statutes of limitation. Of course, in considering this statutory language, courts must be guided by the often-stated rule of interpreting criminal statutes of limitations liberally in favor of the accused. *Toussie* v. *United States*, 397 U.S. 112, 115 (1970); United *States* v. *Scharton*, 285 U.S. 521, 522 (1932); *cf. United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952). The legislative intent behind criminal statutes of limitation has previously been recognized by this Court when it noted that these statutes ". . . provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced . . ." *United States* v. *Marion*, 404 U.S. 307, 322 (1971). When Congress provided that "[n]o person shall be prosecuted, tried, or punished . . ." beyond a certain time-period, it did not, *ipse dixit*, contemplate that a private agreement between the WSPF and Petitioner could amend that provision. The decisions interpreting the general Federal criminal statute of limitations, 18 U.S.C. § 3282, which is couched in terms identical to 2 U.S.C. § 455(a), leave no question as to the jurisdictional nature of these statutes. Moreover, no court, including the Court of Appeals below, has expressly analyzed this statutory language without finding the statute to be a jurisdictional limitation upon the power of the Court to act.

In *Waters* v. *United States*, *supra*, the Court was asked to decide whether the appellant could claim the protection of the statute of limitations for the first time on appeal. The Court distinguished civil statutes of limitations, which merely limit the remedy, from crim-

inal statutes of limitations, which limit the power of the sovereign to act against the accused. The Court then appropriately looked to the language of the statute:

> The language of the statute clearly provides that no person shall be prosecuted, tried, or punished for the offense charged here, unless the information is instituted within three years after the commission of the offense. It is plainly a limitation upon the power to prosecute or to punish. It is, therefore, jurisdictional, and noticeable at this stage of the proceedings.[6]

328 F.2d at 743.

In *United States* v. *Harris, supra*, Judge Whittaker was confronted with a motion, pursuant to 28 U.S.C. § 2255, raising the bar of 18 U.S.C. § 3282, to crimes charged in counts of the information to which movant pled guilty and for which he was sentenced. The Court distilled one of the questions to be resolved down to whether the limitation imposed by § 3282 was jurisdictional or a matter of affirmative defense which could be waived by a guilty plea. Again, the answer was found in the language of the statute:

> Note that Section 3282 is not couched in language of repose, but, rather in language of extinguishment or prohibition of prosecution. It says 'no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed.' It seems to me that in the circumstances

[6] The Court of Appeals ". . . [chose] not to adopt the *Waters* rationale." Slip Opinion, pp. 9-10, n. 9.

> here the statute presented a situation that deprived the Court of jurisdiction to pronounce a judgment of guilty . . .

133 F. Supp. at 799.

Numerous other Federal and State courts that have considered the character of criminal statutes of limitations have concluded that they are jurisdictional. *E.g., Taylor* v. *O'Grady*, 113 F.2d 798 (8th Cir. 1940); *State* v. *King*, 282 So. 2nd 162 (Fla. 1973); *City of Cleveland* v. *Hirsch*, 26 Ohio App. 2nd 6, 268 N.E. 2nd 600 (1971); *Savage* v. *Hawkins*, 239 Ark. 658, 391 S.W. 2nd 18 (1965); *Herman* v. *People*, 125 Colo. 46, 223 P. 2nd 873 (1951); *People* v. *McGee*, 1 Cal. 2nd. 611, 36 P.2nd 378 (1934); and *State* v. *Steensland*, 33 Id. 529, 195 P. 1080 (1921). *Cf. Zales* v. *Henderson*, 433 F.2d 20, 23 n.8 (5th Cir. 1970). Moreover, the holding in *Benes* v. *United States, supra*,[7] where the Court looked to the character of a criminal statute of limitations in concluding that the statute could not be waived by an agreement between the Government and the accused, supports a jurisdictional interpretation of 2 U.S.C. § 455(a).

In holding that the statute is in the nature of a defense, which if not timely raised, is waived, the Court of Appeals placed undue reliance upon a case decided by this Court more than one hundred years ago. In *United States* v. *Cook*, 84 U.S. (17 Wall) 168 (1872), the issue before this Court was whether a criminal statute of limitations could be raised by demurrer to the indictment. Scrutiny of the Court's opinion reveals not an analysis of whether a criminal statute of

[7] The decision of the Court in *Benes* is discussed in greater depth at p. 13, *infra*.

limitations is jurisdictional or defensive, but rather an extended consideration of principles of technical pleading and statutory construction unrelated to the jurisdictional question. The Court's ultimate conclusion that the statute of limitations had to be *raised* by a plea in bar is of little assistance in determining whether the statute is a matter of jurisdiction or a matter of defense. Subsumed in *Cook*, and the cases emanating therefrom, is the notion that it is the Government's affirmative duty to prove that the statute has not, *in fact*, run. *Cook* stands for the proposition that by failing to raise the plea, a defendant will be deemed to have admitted that which the Government could have proven factually.[8]

In *United States* v. *Harris, supra*, Judge Whittaker had occasion to consider *Cook* and its progeny in the course of concluding that 18 U.S.C. § 3282 was jurisdictional. His succinct and accurate analysis is equally applicable to the case at bar.

> I find a good many cases stemming from *United States* v. *Cook*, 17 Wall. 168, 84 U.S. 168, 179, 21 L.Ed. 538, such as *United States* v. *Brace*, D.C., 143 F. 703, *Greene* v. *United States*, 5 Cir., 154 F. 401, 411, *United States* v. *Andem*, D.C., 158 F. 996, 999, *Evans* v. *United States*, 4 Cir., 11 F.2d 37, 39, *Hughes* v. *United States*, 6 Cir., 114 F.2d 285, 288, *Capone* v. *Aderhold*, 5 Cir., 65 F.2d 13, *United States* v. *Parrino*, 2 Cir., 203 F.2d 284, and *United States* v. *Johnson*, D.C. Pa., 76 F. Supp. 542, 544, holding that the bar of the statute of limitations in actions pending in a Federal Court is a matter of

[8] In the case at bar an evidentiary hearing before the District Court established beyond question that the statute of limitations had, *in fact*, run and that it had not, *in fact*, been tolled by any exception thereto.

> affirmative defense, and cannot be raised by a demurrer to the indictment or information, but only by a plea in bar. However, I believe that those cases all rest on the principle announced in *United States* v. *Cook, supra*, that the prosecution must be allowed an opportunity, in meeting the defense of limitations, to show the existence of some exception to the rule, such as fleeing from the scene or jurisdiction of the crime, and other similar exceptions applicable to most of the cases cited, but conspicuously absent in the instant case, as there appear to be be no exceptions to the limitation provisions of Section 3282, Title 18 U.S.C.A., applicable to a case such as the one now before me.

133 F. Supp. at 798-799.

There is nothing in *Cook* inconsistent with the proposition that 2 U.S.C. § 455(a) constitutes a jurisdictional limitation upon the power of the Court to try and punish a defendant. Both the language of the statute, which embodies the intent of Congress, and the decisions of other Federal and State courts, lend support to the jurisdictional character of 2 U.S.C. §455(a). Yet, the Court of Appeals, relying upon *Cook* and two cases decided by the Court of Appeals for the Second Circuit,[9] reached a contrary conclusion. This case affords an opportunity for the resolution of this apparent conflict among the Federal courts.

[9] *United States* v. *Doyle*, 348 F.2d 715 (2nd Cir.), *cert. denied*, 382 U.S. 843 (1965) and *United States* v. *Parrino*, 212 F.2d 919 (2nd Cir.), *cert. denied*, 384 U.S. 840 (1954).

2. The Decision Below Raises Important Questions of Whether the Government and a Defendant Can Privately Agree to Waive a Congressionally Imposed Time Period Within Which Law Enforcement Authorities Must Institute Criminal Proceedings.

Regardless of whether 2 U.S.C. § 455(a) is a jurisdictional limitation or a matter of defense, the decision below is contrary to explicit statutory language and contravenes notions of public policy underlying all criminal statutes of limitations. The contravention of this language and these policies suggests the obvious need for this Court to consider the propriety of permitting the statute to be extended by a private agreement between the parties.

Criminal statutes of limitations serve the policy in favor of prompt prosecution which inures to the benefit of the public as well as to the individual defendant. Congress has mandated that prosecutions for violations of 18 U.S.C. § 610 be barred unless they were instituted within three years after the date of the violation. Thus, it was determined and specifically legislated that the public interest requires a shorter period of limitations than is generally applicable to Federal offenses. Can this Congressional mandate be abrogated by a private agreement between the government and a defendant? Can the executive expand its power to prosecute beyond a legislative limitation through a simple agreement with a citizen? In answering these questions in the affirmative, the Court of Appeals has flaunted the language of the statute and the policies underlying it, and has offended the Constitutional requirement of a separation of powers. Moreover, it has placed itself squarely in conflict with the decision of the Sixth Circuit Court of Appeals in *Benes* v. *United States, supra.*

In *Benes*, a complaint was filed charging the defendant and his wife with tax fraud prior to the expiration of the relevant statute of limitations. The defendant quickly initiated an action in Federal court seeking to prevent the presentation of evidence to the grand jury. At two separate junctures in the litigation, the United States Attorney and the defendants' attorney entered into agreements whereby the United States Attorney agreed not to present evidence to the grand jury until the resolution of the litigation. The litigation was resolved, and when the indictment was returned the statute of limitations had run as to Count II of the indictment. The defendant contended that Count II of the indictment was therefore barred by the statute of limitations. The United States Attorney apparently argued that his agreement with defense counsel obviously contemplated a waiver of the statute of limitations. The Court resolved the issue as follows:

> In criminal actions it has been stated that the purpose of statutes of limitations is to afford immunity from punishment, . . . and that such statutes are construed, in contradistinction to statutes applicable to civil actions, not as statutes of repose going to the remedy only, but as creating a bar to the right of prosecution. . . .
>
> And the general rule is further that an indictment, found after the expiration of the time for beginning prosecution, is barred by the statute of limitations and is not waived by the fact that the prosecution was withheld on account of an agreement with the accused, or by the fact that the accused procured continuances of the preliminary hearing from time to time until the period of limitation had expired. [citations omitted]

276 F.2d at 108-109. The import of the Court's decision, which is based in large part upon its analysis of

the character of criminal statutes of limitations, is that an agreement between the government and a defendant cannot toll the statute.

The holding in *Benes* was cited with approval by the Court of Appeals for the District of Columbia Circuit in *Chaifetz* v. *United States*, 109 U.S. App. D.C. 349, 288 F.2d 133 (1960), *cert. denied*, 366 U.S. 209 (1961).[10] In *Chaifetz*, the appellant contended that the district court had committed error when it refused to give an instruction on a lesser included offense of the indicted crime of income tax evasion. As in *Benes* and the case at bar, the statute of limitations applicable to the lesser included offense had in fact run and there was no applicable exception, such as 18 U.S.C. § 3290, that could have tolled it. In holding that the instruction was properly denied, the Court was effectively telling the appellant that his implicit offer to waive the bar of the statute of limitations could not be accepted since the statute reflected the applicable law which bound the Court. In doing so, the Court adopted the holding in *Benes*:

> As was pointed out by the Court of Appeals for the Sixth Circuit in *Benes* v. *United States*, a statute of limitations in a criminal case, unlike such a statute in civil matters, is not merely a statute of repose, but creates a bar to prosecution.

288 F.2d at 135-136.

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[10] Despite that citation, in its decision below, the Court of Appeals chose not to follow this holding from *Benes* which it described as unreliable dicta. Slip Opinion, p. 9, n.8. Rather than also repudiating its own holding in *Chaifetz*, the Court of Appeals chose instead to deemphasize the *Benes* language which was "mentioned" in the course of its opinion in *Chaifetz*. Slip Opinion, p. 9.

The decisions in *Benes* and *Chaifetz* are reflective of a public policy, previously recognized by this Court, antithetical to the extension of a Congressionally imposed criminal statute of limitations by private agreement. 18 U.S.C. § 3282, the general Federal criminal statute of limitations, states: "[e]xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense . . . ." This Court has ruled that this language states a policy declared by Congress that the period provided by the statute of limitations should not be *extended* "[e]xcept as otherwise provided by law." *Toussie* v. *United States*, 397 U.S. at 115. This policy applies with equal force to 2 U.S.C. § 455(a) and the case at bar. A criminal statute of limitations cannot be, as it was here, extended and in effect amended without Congressional action. The statute contains no exception for waivers. Elsewhere, when Congress intended to provide for a waiver of a limitations period, it has specifically so provided. *See, e.g.*, 10 U.S.C. § 804(a).

The propriety of permitting 2 U.S.C. § 455(a) to be waived through a private agreement in the face of contrary statutory language, public policy, and Federal decisions deserves the consideration of this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1976

CRIMINAL No. 76-110

No. 76-1622

UNITED STATES OF AMERICA

v.

CLAUDE C. WILD, JR., *Appellee*

Appeal from the United States District Court for the District of Columbia.

Before: BAZELON, *Chief Judge*, TAMM and ROBB, *Circuit Judges*

Judgment

(Filed January 21, 1977)

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed and this case is hereby remanded to the District Court for further proceedings not inconsistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Date: January 21, 1977
Opinion for the Court filed by Circuit Judge Tamm.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

(Caption Omitted in Printing)

Argued October 20, 1976

Decided January 21, 1977

Judgment entered this date 1/21/77

John P. Lydick, Assistant Special Prosecutor with whom *Charles F. C. Ruff,* Special Prosecutor and *Allan L. Adlestein,* Assistant Special Prosecutor, Watergate Special Prosecution Force, were on the brief for appellant.

Cary M. Feldman, with whom *William G. Hundley,* was on the brief for appellee.

Before: BAZELON, *Chief Judge,* TAMM and ROBB, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge*: This is a case of first impression. The United States appeals from the district court's pretrial dismissal of Count II of the indictment against the defendant, Claude C. Wild, Jr., on the ground that the statute of limitations barred prosecution of that Count as a matter of law.[1] The United States contends on appeal that the defendant expressly waived his statute of limitations defense and that therefore the dismissal was in error. Wild, on the other hand, asserts that the statute of limitations is not a waivable defense, in that once it has run, a court is deprived of jurisdiction over the matter. We decided that where, as here, the defendant followed the advice of competent coun-

[1] Count II of the indictment alleged that the defendant, in his capacity as an officer of Gulf Oil Corporation, willfully consented to a corporate contribution on September 27, 1972, in connection with the election of Sam Nunn to the United States Senate, a violation of 18 U.S.C. § 610 (Supp. V 1975). Government Brief at 2 n.1, 3 n.4; J.A. at 4A-5A.

sel and executed an express written waiver prior to the expiration of the statute of limitations, the district court was not without jurisdiction to try him upon his subsequent indictment.

I. FACTUAL BACKGROUND

On November 13, 1973, the defendant (then vice-president of Gulf Oil Corporation) pled guilty to an information charging him with a single misdemeanor violation of 18 U.S.C. § 610.[2] The government, through the Watergate Special Prosecution Force (WSPF), reopened its investigation of the defendant and Gulf in 1975, ultimately concluding that Wild had not fully disclosed all of Gulf's contributions to federal officials during his previous encounter with the WSPF. Wild and his attorney, Leo T. Kissam,

[2] Title 18 U.S.C. § 610 (Supp. V 1975) provides in part:

> It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be noted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.
>
> Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $25,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $50,000 or imprisoned not more than two years, or both.

were notified of WSPF's position early in September of 1975, and on September 22, 1975, WSPF attorneys informed Kissam that they were prepared to seek an indictment against Wild for three violations of 18 U.S.C. § 610, one of which was the allegedly illegal contribution to Senator Nunn now at issue. Kissam was also told that the proposed indictment would be returned on September 26, one day before the statute of limitations would expire on the Nunn contribution. Plea bargaining then began, with the government seeking more information regarding illegal corporate contributions and the defendant seeking to avoid his indictment.

As Kissam did not consider himself sufficiently experienced in criminal law to proceed further as counsel for his client, both he and Wild sought assistance from attorney Edward B. Williams. Williams contacted the WSPF attorney in charge of Wild's case on September 25 to advise him that he would now be representing the defendant. Williams also stated that he realized that the statute of limitations would expire in two days, but that he nevertheless desired more time to prepare the case and explore a possible disposition with his client and the WSPF. In return, he proposed that his client execute and deliver a written waiver of the statute of limitations. This was done, but since the WSPF attorneys had also prepared a similar waiver, Wild immediately signed that one too.[3] In light of this development, the WSPF

[3] The text of this express waiver follows:

> I have been advised by your office [WSPF] that a federal grand jury is presently investigating my alleged involvement in the making of unlawful corporate campaign contributions by Gulf Oil Corporation and particularly my alleged involvement with respect to corporate contributions made in connection with the 1972 election campaign of Sam Nunn, a candidate for United States Senator from Georgia.
>
> In consideration of your office's delaying any final decision with respect to charging me with any criminal violations in connection with the alleged contribution to Sam Nunn's campaign, a delay requested by me for my benefit, I hereby waive all defenses grounded upon the applicable statute of limitations with respect to the Nunn transaction. I have discussed this matter with my attorney, Edward Bennett Williams, Esq., and I fully understand the consequences of this waiver.

J.A. at 9A.

decided not to proceed to the grand jury on September 26 as they had originally planned.

Williams visited the WSPF shortly thereafter and, in the hope that the WSPF might drop its plans to seek an indictment or, at least, reduce the number of charges, he raised the possibility of Wild's cooperative testimony. In November of 1975, a proffer of such testimony was actually made; however, Williams' partner who was handling the case subsequently advised the WSPF that he and his firm would have to withdraw from their representation of Wild due to a potential conflict of interest. Wild, therefore, once again set out to find new counsel.

Wild's present counsel, William G. Hundley (who has no connection with the Williams' firm), was informed by the WSPF of the defendant's waiver of the statute of limitations. Hundley continued the plea bargaining initiated by Williams, and after further negotiations, Wild was interviewed in the WSPF offices in December and January. These interviews laid the groundwork for the defendant's appearance before the grand jury under a grant of use immunity on January 27, 1976.

On March 9, 1976, the WSPF, having made some minor changes to the earlier proposed indictment, advised Hundley that on March 12, 1976, it would request that the grand jury indict the defendant on two counts of violating 18 U.S.C. § 610. Wild evidently did not come forth with the testimony which the WSPF was seeking as he was subsequently indicted. The district court found Count II of this indictment, which referred to the Nunn

contribution, to be barred by the statute of limitations in spite of the defendant's written waiver, and thus the court dismissed this charge. It is the propriety of this ruling which is now before us.

II. Waiver of the Statute of Limitations

We have found no case precedent, nor has any been brought to our attention, which would apply precisely to the issue presented here, that is, whether a defendant, after consultation with his counsel, may waive the statute of limitations,[4] apparently in the hope that by so doing, he would escape prosecution as a result of plea bargaining.[5] The first step in our analysis, therefore, is to determine whether the statute constitutes a jurisdictional bar to prosecution or whether it is equivalent to an affirmative defense.

In an early Supreme Court case dealing with the nature of a statute of limitations containing language substantially the same as the one here, *United States* v. *Cook*, 84 U.S. 168 (1872),[6] the defendant demurred to his indictment on the ground that the crimes alleged therein appeared to have been committed more than two years before

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[4] The particular statute of limitations which concerns us here provides in pertinent part:

> No person shall be prosecuted, tried, or punished for any violation of . . . section 610 . . . of Title 18, unless the indictment is found or the information is instituted within 3 years after the date of the violation.

2 U.S.C. § 455(a) (Supp. V 1975).

[5] J.A. at 96A-97A.

[6] No person shall be *prosecuted, tried,* or *punished* for any offence not capital, unless the indictment or information for the same shall be found or instituted within *two years* from the time of committing the offence . . . .

United States v. Cook, 84 U.S. 168, 169 (1872) (emphasis in the original).

the filing of the indictment so that the statute of limitations barred his prosecution. Unfortunately, the Court's analysis of this argument is clouded somewhat by the archaic language necessarily attendant on any discussion of the old common law forms of pleading. The Court's discussion essentially focused on the defendant's ability to raise the issue of the statute's bar by demurrer (which admitted every allegation pleaded but nonetheless demanded that the action be dismissed as, for instance, in a case where all the facts alleged are true but the court has no jurisdiction over the matter) rather than by special plea (which was a means of raising affirmative defenses such as those under Fed. R. Crim. P. 12(b) today). If one makes his way through all of the old terminology used in the opinion, one finds that the bottom line of the decision is that a demurrer was inappropriate because the statute of limitations is not an element of the offense and therefore, need not be alleged in the indictment; thus, the defendant must raise it as a defense. *Id.* at 178. The Court stated that

> Accused persons may avail themselves of the statute of limitations by special plea or by evidence under the general issue, but courts of justice, if the statute contains exceptions, will not quash an indictment because it appears upon its face that it was not found within the period prescribed in the limitation . . . .

Id. at 179.

Thus, the Court found that the defendant had to raise the statute of limitations by special plea, or as an affirmative defense in today's terminology, in order that the government might have a chance to show that an exception tolling the statute applied to the particular defendant. Although the parties did not raise the issue, and the Court made no mention of the effect of the statute's expiration on a court's subject matter jurisdiction, it is clear that the

Court considered the statute to be in the nature of a *defense* which must be raised by the defendant.[7]

The law of this circuit is consistent with Cook's view of the nature of the statute of limitations. In *Askins* v. *United States*, 251 F.2d 909 (D.C. Cir. 1958), the defendant had been indicted for first degree murder, a capital offense having no statute of limitations, but convicted of second degree murder, a lesser included offense having a three-year limitation. After his conviction was affirmed on appeal, he filed a motion under 28 U.S.C. § 2255 (1970) to set aside his sentence, arguing for the first time that the indictment resulting in his conviction had been returned more than three years after the crime. The court ruled that the defendant could raise the limitation in this collateral attack on his second degree murder conviction even though he had not done so at trial because he "could not have objected to being tried on the indictment since it was for first degree murder, as to which there is no time limitation." *Id.* at 912. The court took care to note, however, that the case would be different were the statute of limitations applicable to the offense actually charged in the indictment (such as in the case *sub judice*) as opposed to a lesser included offense that remains only an implicit possibility until the verdict is rendered. In the first of these two situations

> the defense of the statute must be raised at the trial or before trial on motion. If this is not done and a verdict of guilty is rendered, sentence may be lawfully imposed. In other words, we differentiate that situation from our holding in the present case . . . .

[7] *Accord*, Biddinger v. Commissioner of Police, 245 U.S. 128, 135 (1917) ("The statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases . . . .") United States v. Kenner, 354 F.2d 780, 785 (2d Cir. 1965), *cert. denied*, 383 U.S. 958 (1966).

Id. at 913 (citations omitted). This *Askins* "differentiation" is directly in line with the *Cook* view that the limitation is a defense which must be raised by the defendant.

Wild nevertheless argues that language from a subsequent similar case in this circuit, *Chaifetz* v. *United States*, 288 F.2d 133 (D.C. Cir. 1960), *cert. denied*, 366 U.S. 209 (1961), supports his contention that the statute constitutes a jurisdictional bar to prosecution rather than an affirmative defense. In *Chaifetz* the defendant requested the trial court to give the jury a lesser included offense instruction, even though the lesser offense was barred by the statute of limitations. This court ruled that the instruction was properly refused because the defendant could not be convicted of the lesser included offense. However, in so ruling, the court mentioned that "a statute of limitations in a criminal case . . . is not merely a statute of repose but creates a bar to prosecution"[8] *Id.* at 135-36. Wild argues that this language implies that the statute of limitations in criminal cases is jurisdictional. Appellee's Brief at 6. We disagree, for when we view this language in light of *Cook*, it is apparent that such is not the case. The Supreme Court recognized that the statute of limitations in *Cook* was a defense which might eventually bar prosecution, but only if the government could not prove any applicable exception. In this respect only is the statute of limitations a "bar to prosecution."[9]

[8] As support for this proposition, the court relied on some dicta from a Sixth Circuit opinion which we find to be unreliable and therefore do not follow. Benes v. United States, 276 F.2d 99, 108-08 (6th Cir. 1960).

[9] Wild's misinterpretation of this language in *Chaifetz* seems to be derived from a Tenth Circuit opinion in which that court, citing *Chaifetz*, held that the defendant could raise the statute of limitations for the first time on appeal and thus limit the court's power to punish him. The court thus found, ("[n]otwithstanding . . . the differentiation made in Askins"), that the

Our next task then, having decided that the statute does not constitute a jurisdictional bar, is to determine whether Wild could validly waive his potential defense based on the statute of limitations by a written agreement with the WSPF prior to its expiration. At least one circuit has ruled that the statute of limitations defense can effectively be waived by the defendant, clearing the way for his subsequent prosecution. In that case, *United States* v. *Parrino*, 212 F.2d 919 (2d Cir.), *cert. denied*, 348 U.S. 840 (1954), the Second Circuit affirmed the district court's sentencing of a defendant who deliberately, and with the advice of counsel. decided to waive the statute of limitations by pleading guilty. *Id.* at 922. Furthermore, the Second Circuit was confronted with a situation closely analogous to the one at hand in *United States* v. *Doyle*, 348 F.2d 715 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965). There the government obtained an indictment against Doyle and others on July 2, 1962, and requested that it be immediately impounded so as not to prevent the return to the United States of two of the defendants. In August of 1962, Doyle's attorney contacted the Department of Justice attorneys in charge of the case and requested that they conduct an investigation into a purported immunity agreement between Doyle and the Securities and Exchange Commission. That investigation apparently revealed that no such immunity had been granted because in April of 1963 the Justice Department decided to go forward with its prosecution of Doyle and so advised his attorneys. During the course of the subsequent plea bargaining, Doyle requested that the indictment remain sealed. The indictment was finally unsealed on August 6, 1963, after the applicable five year statute of limitations had run.

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limitation was jurisdictional. Waters v. United States, 328 F.2d 739, 743 (10th Cir. 1964). We believe the *Askins* differentiation to be in line with the Supreme Court's holding in *Cook* and thus choose not to adopt the *Waters* rationale.

Just as Wild engaged in negotiations with the WSPF in the hope of eventually avoiding prosecution, so did Doyle. His attorney candidly admitted that "by presenting the Department with evidence of a commitment [of immunity] I hoped they would hold up whatever it was they were doing, that is, if they were still considering prosecution that they give up the idea . . . ." *Id.* at 717. Doyle originally entered a plea of not guilty to all counts but, after further plea bargaining, withdrew it and entered a plea of guilty to one count, whereupon the government moved to dismiss the remaining counts. Doyle appealed from his sentence on this one count, arguing that the indictment was unsealed after the statute of limitations had run, and therefore, the district court judgment had to be reversed.

Judge Friendly, in an opinion affirming the district court's decision, wrote that an unqualified plea of guilty "bars further consideration of all but the most fundamental premises for the conviction, of which the subject-matter jurisdiction of the court is the familiar example." *Id.* at 718-19. He went on to say that under *Cook* and *Parrino*, Doyle's statute of limitations and speedy trial claims did not rise to this level. Perhaps most important in terms of the issue confronting us, Judge Friendly noted:

> Even if such claims are not waived by pleas of guilty *simpliciter*, a defendant advised by counsel can agree so to waive them, and the circumstances compel the conclusion that Doyle did precisely that.

Id. The court therefore found that an implicit agreement was sufficient to waive the statute of limitations.

We agree with the Second Circuit's interpretation of *Cook* and *Parrino*, and therefore find that Wild could effectively waive his statute of limitations defense. The case for such a decision is even stronger here than it was in *Doyle*. In the case at bar, Wild's attorney negotiated for the express waiver, obviously intending that his client would

derive some benefit from it. Wild executed such waiver knowingly and willfully after full consultation with his attorney.

The policy behind the statute of limitations is not violated by our holding that Wild could waive this defense. As the Supreme Court explained in *Toussie* v. *United States*, 397 U.S. 112, 114-15 (1970):

> The purpose of the statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutory effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.

The law enforcement officials here, the WSPF, needed no such encouragement. They were prepared to seek an indictment before the statute ran, and it was only after the intercession by defendant's attorney that they agreed to wait. Furthermore, the consideration supporting this policy of limitation, that the defendant is "handicap[ped] in ascertaining the truth after the lapse of years from the events in question," *Askins, supra* at 912, is totally inapplicable to the present case. The delay from September 1975 to March 1976, when Wild was finally indicted, is substantially attributable to the defendant's attempts to obtain a beneficial disposition of his case by means of plea bargaining. The defendant thus may not complain that the government has chosen to prosecute a "stale claim"; if it indeed is stale, only he is responsible. We consider it of prime importance to our decision here that *Wild* was the

one who sought to waive this defense; it was not the government attorneys who sought the extra time in which to make their case.

We find further support for our decision to allow the waiver in this instance in the FEDERAL RULES OF CRIMINAL PROCEDURE. Although FED. R. CRIM. P. 12(b) does not explicitly state when the defense of the statute of limitations must be raised, we note that at least wo commentators are in agreement that the sensible rule is that it is waived if not raised at or before trial.[10] Such agreement perhaps results from the Advisory Committee Note to Rule 12 which states that the limitation defense does not *have to be* raised *prior* to trial, the inference being that the pleader has the option of raising it either in a pretrial motion or by a motion during the trial.[11] As one writer has persuasively reasoned:

> Rule 12 is silent as to when nonwaivable defenses [those which are not waived by failure to raise by pretrial motion], other than lack of jurisdiction and failure to charge an offense, *must* be raised. Since the Rule expressly permits the latter two defenses to be raised at any time during the pendency of the proceeding, it may by negative implication be inter-

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[10] 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 193, at 409-10 (2d ed. 1969); 8 MOORE'S FEDERAL PRACTICE ¶ 12.03 [1], at 12-17, -18 (2d ed. 1976) (hereinafter cited as MOORE'S).

[11] The pertinent paragraph of the Advisory Committee Note reads:

> In the other group of objections and defenses, which the defendant at his option may raise by motion before trial, are included all defenses and objections which are capable of determination without a trial of the general issue. They include such matters as former jeopardy, former conviction, former acquittal, *statute of limitations*, immunity, lack of jurisdiction, failure of indictment or information to state an offense, etc. Such matters have been heretofore raised by demurrers, special pleas in bar and motions to quash.

MOORE'S, *supra* at 12-6 (emphasis added).

> preted as foreclosing the other defenses if not raised during the trial itself. It seems clear at least that the defense of the statute of limitations should be raised no later than the trial . . . .[12]

It seems to us, too, that if a defendant may waive certain constitutional rights, he should certainly be capable in this instance of waiving a statutory right such as the statute of limitations. Constitutional rights which the defendant may waive include, *inter alia*, the right to be represented by counsel,[13] the right not to be twice put in jeopardy,[14] and the right to be tried in the district where the offense was committed.[15] If the strong policies behind these rights are not violated by a rule permitting them to be waived by a defendant, we cannot find that the limitation statute's policy is violated here where the defendant was fully cognizant of the consequences of such a waiver and decided to execute it on the advice of his attorney for his own benefit.

Finally, the defendant contends that if he could legally waive his statute of limitations defense, the particular waiver which he signed was void as against public policy because it contained no time restriction on how long the government could wait before seeking his indictment. In the abstract, this argument may be appealing, but we find it unavailing in the context here. The statute of limitations is tolled, for example, for as long as a de-

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[12] *Id.* at 12-17, -18 (citations omitted).

[13] United States v. Calabro, 467 F.2d 973, 985 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); *U.S. Const.* amend. VI.

[14] United States v. Scott, 464 F.2d 832, 833 (D.C. Cir. 1972); *U.S. Const.* amend. V.

[15] Jones v. Gasch, 404 F.2d 1231, 1235 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968); *U.S. Const.* amend. VI.

fendant is a fugitive from a particular jurisdiction.[16] Wild did not flee, but instead sought to promote his own best interests by remaining and engaging in plea bargaining. In either case, it is the defendant who in effect controls the timing of his prosecution; in the former, prosecution would commence upon the fugitive's return to the jurisdiction, and in the latter, it commenced after Wild's unsuccessful attempt to dispose of the case through plea bargaining. Thus, even though there was no express time limit on his waiver, Wild was prosecuted within a reasonable length of time and has shown no prejudice resulting from the delay of approximately six months. Just as "the statute of limitations does not run in favor of fugitives from justice,"[17] neither does it run in favor of the defendant here who, by his own initiative, persuaded the government to agree to a waiver while he pursued the possibility of a plea arrangement.

III. Conclusion

For the foregoing reasons, we find that the defendant Wild validly waived the statute of limitations defense for his own benefit, after consultation with competent counsel and with a full appreciation of the waiver agreement's legal significance. We therefore reverse and remand this case to the district court for further proceedings not inconsistent with this opinion.

So ordered.

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[16] Title 18 U.S.C. § 3290 (1970) which applies as an exception to all federal statutes of limitations provides:

> No statute of limitations shall extend to any person fleeing from justice.

[17] United States *ex rel.* Demarois v. Farrell, 87 F.2d 957, 960 (8th Cir.), *cert. denied*, 302 U.S. 683 (1937).

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Criminal No. 76-110
(18 U.S.C. Section 610)

UNITED STATES OF AMERICA,

v.

CLAUDE C. WILD, JR., *Defendant.*

COUNT ONE

1. Gulf Oil Corporation, is and was, at all times material to this indictment, a corporation organized under the laws of the Commonwealth of Pennsylvania.

2. The defendant, CLAUDE C. WILD, JR., was, at all times material to this indictment, an officer of Gulf Oil Corporation, to wit, Vice President-Government Relations, and was acting in that capacity.

3. On or about November 5, 1974, a general election was held pursuant to the Constitution and laws of the United States at which Senators and Representatives to Congress were voted for and said election was preceded by primary elections, political conventions and caucuses held to select candidates for said offices.

4. Between, on or about March 15, 1973, and on or about June 30, 1973, in the District of Columbia and elsewhere, the defendant, CLAUDE C. WILD, JR., in his capacity as an officer of Gulf Oil Corporation, did willfully and unlawfully consent to the making of a contribution by Gulf Oil Corporation in connection with the aforesaid general and primary elections: to wit, a contribution in connection with the primary election and election of Daniel Inouye, a candidate for the office of United States Senator in Congress, in the amonut of approximately $5,000.

(Title 18, United States Code, Section 610)

COUNT TWO

1. The allegations contained in paragraphs 1 and 2 of Count One of this indictment are realleged and incorporated by reference herein.

2. On or about November 7, 1972, a general election was held pursuant to the Constitution and laws of the United States at which Senators and Representatives to Congress were voted for and said election was preceded by primary elections, political conventions and caucuses held to select candidates for said office.

3. On or about September 27, 1972, in the District of Columbia and elsewhere, the defendant, CLAUDE C. WILD, JR., in his capacity as an officer of Gulf Oil Corporation, did willfully and unlawfully consent to the making of a contribution by Gulf Oil Corporation in connection with the aforesaid general election and primary elections: to wit, a contribution in connection with the primary election and election of Sam Nunn, a candidate for the office of United States Senator in Congress, in the amount of approximately $2,500.

(Title 18, United States Code, Section 610)

A TRUE BILL

.....
Foreman

/s/ CHARLES F. C. RUFF
Charles F. C. Ruff
Special Prosecutor
U. S. Department of Justice
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315 Ninth Street, N. W.
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Supreme Court, U. S.
FILED
APR 14 1977
MICHAEL RODAK, JR., CLERK

No. 76-1312

In the Supreme Court of the United States

OCTOBER TERM, 1976

CLAUDE C. WILD, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES F. C. RUFF,
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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1312

CLAUDE C. WILD, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether a prospective defendant in a federal criminal case may expressly waive the statute of limitations before expiration for his own benefit, after consultation with counsel, and with a full appreciation of the legal significance of the waiver.

STATUTORY PROVISION INVOLVED

2 U.S.C. § 455(a)(1975) provides in pertinent part:

> No person shall be prosecuted, tried or punished for any violation of . . . section . . . 610, . . . of Title 18, United States Code, unless the indictment is found or the information is instituted within 3 years after the date of the violation.

STATEMENT

On March 12, 1976, a grand jury empaneled in the District of Columbia returned a two-count indictment charging petitioner with making two corporate contributions in connection with federal elections in violation of 18 U.S.C. § 610.[1] After hearings on pre-trial motions the district court dismissed Count II of the indictment on the ground that it was barred by the statute of limitations. The court of appeals reversed in a thorough opinion (Pet. App.) on which we rely.

The facts are summarized in the opinion of the court below (Pet. App. 3a - 6a). Briefly, they show that, on November 13, 1973, following a Watergate Special Prosecution Force (WSPF) investigation, petitioner pleaded guilty to an information charging him with a single misdemeanor violation of 18 U.S.C. § 610 arising out of his activities as an officer of Gulf Oil Corporation. In 1975 the WSPF reopened its investigation and ultimately concluded petitioner had not disclosed all corporate contributions made by him to federal candidates during his first encounter with the WSPF in 1973.

In September, 1975, petitioner and his attorney, Leo T. Kissam, were notified of the investigation. On September 22, 1975, WSPF attorneys advised Kissam that they were prepared to seek the return of an indictment against petitioner charging him with three violations of 18 U.S.C. § 610, one of which arose out of an allegedly illegal contribution to the campaign of Senator Sam Nunn. Kissam was advised that the indictment

[1] 18 U.S.C. § 610 was repealed by Pub. L. 94-283, Title II, § 201(a), May 11, 1976, 90 Stat. 496. The substance of 18 U.S.C. § 610 is presently codified in 2 U.S.C. § 441b.

would be returned on September 26, 1975, one day before the expiration of the statute of limitations with regard to the Nunn contribution.

Kissam, who was primarily a civil attorney, decided that this matter should be handled by a criminal attorney, and on September 24, 1975, Kissam and petitioner met with Edward Bennett Williams. On the following day, Williams contacted a WSPF attorney to advise that he would be representing petitioner. Williams also stated that he realized that the statute of limitations would expire in two days, but that he wanted additional time to familiarize himself with the case and to explore with his client and the WSPF a possible disposition of the matter. In return, he proposed that petitioner sign a written waiver of the statute of limitations. The WSPF accepted the proposal, and the express waiver was signed by petitioner on September 26, 1975.[2]

[2] The text of this express waiver follows:

> I have been advised by your office [WSPF] that a federal grand jury is presently investigating my alleged involvement in the making of unlawful corporate campaign contributions by Gulf Oil Corporation and particularly my alleged involvement with respect to corporate contributions made in connection with the 1972 election campaign of Sam Nunn, a candidate for United States Senator from Georgia.
>
> In consideration of your office's delaying any final decision with respect to charging me with any criminal violations in connection with the alleged contribution to Sam Nunn's campaign, a delay requested by me for my benefit, I hereby waive all defenses grounded upon the applicable statute of limitations with respect to the Nunn transaction. I have discussed this matter with my attorney, Edward Bennett Williams, Esq., and I fully understand the consequences of this waiver.

Pet. App. 4a, n. 3.

Negotiations between the WSPF and petitioner and his counsel[3] ensued over the next four months, including proffers of testimony, office interviews and a grand jury appearance. On March 9, 1976, petitioner's attorney was advised that a two-count indictment against petitioner would be sought by the WSPF on March 12, 1976, and on that date petitioner was, in fact, indicted.

ARGUMENT

THE ISSUE OF WHETHER A STATUTE OF LIMITATIONS IN A FEDERAL CRIMINAL CASE MAY BE EXPRESSLY WAIVED BY A PROSPECTIVE DEFENDANT DOES NOT WARRANT REVIEW

Petitioner contends, in essence, that the decision of the court of appeals holding the statute of limitations to be a defense which he expressly waived is in conflict with the decisions of other federal courts. He further contends, in the alternative, that, even if the statute of limitations is a defense, to permit an express waiver of that defense would contravene public policy and legislative intent. His contentions are supported neither by the case law nor by the legislative purpose underlying the statute of limitations.

A. The decision of the court of appeals is consistent with relevant decisions of this Court as well as other authorities.

As the court of appeals noted, "[t]his is a case of first impression."[4] No other federal court has considered

[3]Mr. Williams' firm withdrew from representation of petitioner in November 1975, because of a potential conflict of interest. Petitioner then retained his present counsel, William G. Hundley.

[4]Pet. App. 2a.

the validity of an express waiver of the statute of limitations in a criminal case. Nonetheless, the decision of the court of appeals is entirely consistent with the opinions of this Court characterizing the federal statute of limitations as a defense, as well as the better-reasoned opinions of other courts of appeals.

In *United States v. Cook*, 84 U.S. 168, this Court held that the statute of limitations is not an element of the offense and, therefore, that a demurrer to an indictment would not lie, even where the indictment on its face alleges commission of the offense at a date outside the applicable period of limitations. Implicit in this holding, as the court of appeals noted (Pet. App. 7a), is the conclusion that the statute represents a defense which the defendant must assert and not an aspect of the court's jurisdiction which may be noticed at any stage in the proceedings. Similarly, in *Biddinger* v. *Comm'r of Police*, 245 U.S. 128, an appeal from the denial of a habeas petition, this Court had before it the issue of whether the appellant was entitled in the trial court to introduce evidence that the crime for which he was being extradited had occurred beyond the period of the statute of limitations and that he was not a fugitive from justice. In affirming the lower court, Mr. Justice Clarke, citing *Cook*, stated:

> The statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases. . . .

245 U.S. at 135.

Extrapolating from these holdings, the Court of Appeals for the Second Circuit has held that a plea of guilty precluded the defendant's argument on appeal that his prosecution was barred either by the Sixth

Amendment's requirement of a speedy trial or by the applicable statute of limitations. *United States* v. *Doyle*, 348 F. 2d 715 (C.A. 2) (Friendly, J.), *certiorari denied*, 382 U.S. 843. *Accord*, *United States* v. *Parrino*, 212 F. 2d 919, 922 (C.A. 2), *certiorari denied*, 348 U.S. 840. *Cf.*, *United States* v. *Kenner*, 354 F. 2d 780, 785 (C.A. 2), *certiorari denied*, 383 U.S. 958. ("The defense of the statute of limitations must be raised before or during the trial."). *See also*, *United States* v. *Ferri*, 546 F. 2d 419 (C.A. 3), *certiorari denied*, _____ U.S. _____ (45 U.S.L.W. 3667, April 4, 1977).[5]

Only the Court of Appeals for the Tenth Circuit[6] has held the statute of limitations to be jurisdictional. *Waters* v. *United States*, 328 F. 2d 739 (C.A. 10), involved the issue of whether a six-year statute of limitations was applicable to a substantive violation of the Internal Revenue Code,[7] the defendant apparently having raised for the first time on appeal the defense of the three-year

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[5]Several other federal courts have denied relief where the issue of the statute of limitations was raised for the first time on appeal or by collateral attack. *Forthoffer* v. *Swope*, 103 F. 2d 707, 709 (C.A. 9) ("The defense [of the statute of limitations] . . . cannot be considered on appeal where not urged in the trial court . . . and appealable matters may not be considered on petition for writ of habeas corpus."); *Capone* v. *Aderhold*, 65 F. 2d 130, 131 (C.A. 5) ("In some, perhaps most, of the states an indictment is fatally defective which shows on its face that it was returned after the running of the statute of limitations. However, in the federal courts the bar of the statute is a matter of defense . . .);" *Johnson* v. *United States*, 13 Fed. Cas. 867, 868 (No. 7418) (C.C.D. Mich.) ("The court had jurisdiction of the offense, and if there was a bar under the statute, it should have been pleaded . . . . By failing to set up the defence, the defendant waived it.").

[6]One district court has so ruled. *United States* v. *Harris*, 133 F. Supp. 796 (W.D. Mo.).

[7]26 U.S.C. § 5851.

statute.[8] In holding the six-year period inapplicable, the court *sua sponte* addressed the issue of whether the statute of limitations had been timely asserted, and held that, because the statute is jurisdictional, it could be raised for the first time on appeal.

The *Waters* court itself acknowledged[9] that its findings with respect to the statute of limitations were inconsistent with its own prior decisions and with *United States* v. *Cook*, *supra*, and the court below properly rejected its reasoning. (Pet. App. 10a).[10]

The other case principally relied on by petitioner, *Benes* v. *United States*, 276 F. 2d 99 (C.A. 6), does not formally address the issue of whether the statute of limitations may be expressly waived. In *Benes*, the prosecutor and the defendant's counsel agreed that the prosecutor would not present certain evidence to the grand jury until disposition of defendant's appeal from a district court order which dissolved an earlier injunction against that presentation. Subsequent to the agreement but prior to the return of the indictment, the statute of limitations expired. There is no indication whatsoever that the defendant, his counsel, or the prosecutor contemplated a waiver of the state of limitations. Defendant raised the defense of the statute at trial and again on appeal. The court of appeals quite properly held the prosecution to be

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[8]26 U.S.C. § 6531. The charging instrument, on its face, indicated that it was filed more than three years after the date of the offense.

[9]328 F. 2d at 743.

[10]Two leading commentators on the Federal Rules of Criminal Procedure agree that the statute of limitations is a defense which is waived if not raised at trial. 1 C. Wright, *Federal Practice and Procedure* § 193 at 409-10 (1969); 8 *Moore's Federal Practice* § 12.03[1], at 12-17, 18 (2d ed. 1976).

barred. Only in *dictum* did the court state that an agreement between the prosecutor and the defendant will not waive the statute of limitations defense.

B. Express waiver of the statute of limitations contravenes neither public policy nor the intent of Congress.

Petitioner's contention that, even if the statute of limitations is a defense, express waiver of that defense would be violative of public policy and the legislative purpose underlying the statute is without foundation.

This Court has explicitly recognized the role played by plea negotiations in the criminal justice system, *Santobello* v. *New York*, 404 U.S. 257, 260, and in order for such negotiations to be carried on effectively, both parties must act in good faith. Where a prospective defendant, advised by counsel, determines that it is in his best interests to engage in plea discussions and elects to waive a defense afforded for his personal protection, the courts should recognize the validity of that determination. As the court of appeals found (Pet. App. 12a), nothing in the purposes to be served by the statute of limitations—that is, to avoid the hazards of prosecution grounded on evidence obscured by the passage of time, to limit exposure for acts committed in the distant past, and to encourage expeditious investigation of suspected criminal activity—militates in favor of the result petitioner seeks. See *Toussie* v. *United States*, 397 U.S. 112, 114-115. Indeed if the judgment of the district court were upheld, never again would a prosecutor be able to afford to a prospective defendant the opportunity to avoid the cost and strain of indictment, for he would be

unable to rely on even the most informed waiver as part of the negotiation process.[11]

Beyond this, petitioner's contention ignores the fact that a wide variety of rights arising out of the Constitution may be waived so long as the waiver is knowing and intelligent.[12] Surely if rights of constitutional dimension may be waived, no public policy demands a contrary result in this case.

Petitioner's assertion that an express waiver of the defense of the statute of limitations contravenes the legislative intent is not supportable. The staff of the Senate Committee on the Judiciary, in commenting on the statute of limitations as proposed in the Criminal Justice Reform Act of 1975, wrote:

> The classification of the statute of limitations defense as a "bar to prosecution" (which term is defined . . . [to mean a ground for terminating a prosecution in favor of a defendant that must be raised as prescribed by Rule 12 of the Federal Rules of Criminal Procedure]) is intended, in the main, to continue existing law which, with a single minor exception, requires the defense to be raised either before or during the trial. A failure to assert the

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[11]Nor, if the statute were held to be jurisdictional, would a defendant be permitted, as part of the plea negotiating process, to plead to a lesser offense barred by the statute of limitations in exchange for the dismissal of more serious charges not so barred—a course permitted under the holding in *United States* v. *Doyle*, *supra*.

[12]*United States* v. *Calabro*, 467 F. 2d 973 (C.A. 2), *certiorari denied*, 410 U.S. 926 (right to counsel); *United States* v. *Scott*, 464 F. 2d 832 (C.A. D.C.)(right not to be placed in jeopardy twice for the same offense); *Beatty* v. *United States*, 377 F. 2d 181 (C.A. 5), *rev'd on other grounds*, 389 U.S. 45 (right to trial by jury).

> claim timely constitutes a waiver thereof so that the contention may not be first asserted on appeal or on collateral attack of a conviction. This principle applies both to pleas of guilty or nolo contendere and to other trials. [Footnotes omitted.]

Staff of Senate Comm. on the Judiciary, 94th Cong., 1st Sess., *Report to Accompany S.1* (Comm. Print 1975), p. 86.

Again, if failure to raise the defense of the statute of limitations in timely fashion, either through negligence or inadvertance, constitutes a waiver of the defense, then an express waiver, made on the advice of counsel, with full knowledge of its legal consequences, cannot be contrary to public policy or legislative intent.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1977.